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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1050

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

CRAWFORD MANUFACTURING CO., INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

The National Labor Relations Board's Petition for a Writ of Certiorari asks this Court to review the evidence which may be considered in determining if a union organizer, when soliciting membership authorization cards,

made misrepresentations sufficient to preclude the union from obtaining representative status based on these cards. Certiorari has recently been denied in such cases.[1] E.g., *United Automobile Workers* v. *National Labor Relations Board and Aero Corp.*, 385 U.S. 972; *National Labor Relations Board* v. *Winn-Dixie Stores*, 382 U.S. 830. This case involves a question of substantiality of evidence controlled by the rule in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474.

As the basis for granting review, the Board urges the Fourth Circuit erroneously rejected the *Cumberland Shoe* rule concerning solicitor misrepresentations and held that the "clear meaning of the union authorization cards could be impeached by testimony as to the employees' subjective reasons for signing the cards" (Pet. p. 13), thereby placing its decision in alleged conflict with other Circuit Courts of Appeals.

The Board's Petition should be denied. The Fourth Circuit did not hold authorization cards could be impeached by testimony of subjective intent and did not invalidate the cards "simply" on the belief of the employees. The Fourth Circuit applied the *Universal Camera* rule and determined invalidating misrepresentations were made by the card solicitor, adopting a rationale in accord with rationale of the other Circuits. (We shall show later that the conflict is not between the Circuits; the conflict is rather between the Circuits and the Board.)

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1. The Board frames the issue: ". . . whether and under what circumstances a union's representative status may be predicated on authorization cards. . . ." (Pet. p. 9).

POINT I

The Petition for a Writ of Certiorari Seeks to Have This Court Review a Decision by the Fourth Circuit Court of Appeals Which Turned Solely on the Finding That Substantial Evidence Did Not Support the Board's Order.

The Court, contrary to the Board, held there was not substantial evidence in the record considered as a whole to support the Board's finding that the union, when it demanded recognition, had a valid card majority. Contrary to the statement in the Board's "Question Presented,"[2] the evidence demonstrated some employees *were told* and others were led to believe that the sole purpose of the authorization cards was to obtain a Board representation election, and as a result many of the signing employees understood the cards would serve only that purpose. The Court so found, disagreeing however, with dissenting Judge Sobeloff, on the weight of the evidence and the number of cards invalidated.[3] The Court states:

> "The company contends that these cards did not count because they were signed under a misrepresentation of the union: that the purpose of the card was only to have an election to determine whether the employees desired the union to become their bargaining representative. It was not understood by the

2. The "Question Presented" appears on page 2 of the Board's Petition.

3. The Examiner invalidated four cards signed by the employees because ". . . representations were made by union solicitors before they signed cards, to the effect that the cards 'were just to get the vote' or that, 'the sole reason for signing was to get a Labor Board election.'" (Pet. App. C, p. 126). The Examiner found other employees testified that similar misrepresentations were made to them (Pet. App. C, pp. 118-125) but was not persuaded by this testimony because, *inter alia*, it was given in response to leading questions on cross-examination. This issue was not reviewed by the Court because it disposed of the cards generally before examining the individual cards.

employees, the company urges, as an immediate authorization to the union to act as their collective agent. The Board in the past quite frankly conceded that a card signed under the representation that its *sole* purpose was to obtain an election should not be accepted as an appointment of the union. Bauer Welding and Metal Fabricator's, Inc. v. NLRB, 358 F.2d 766, 775-776 (8th Cir. 1967)."

"The company's position is supported by the findings of the Board's Examiner . . ." (Pet. App. A, pp. 19-20).

The Court emphasized the Examiner found that the references by the union solicitor to the election

> ". . . *were interpreted by some of the employees at the meeting as indicating that the cards would be used only for the purpose of obtaining an election*"

that

> "There is much testimony concerning whether Patrick did or did not make such statements at this meeting . . ."

and that, in reply to employee questions concerning the card's purpose, Patrick

> ". . . answered, I find, that the cards would be used first to obtain an election, *that the signers of the cards would not be joining the Union at this time*, that this would be deferred until after the Union had won the election . . ." (Pet. App. A, pp. 20-21) (Emphasis is the Court's).

After reviewing the contentions and findings, the Court recognized it was ". . . obligated to scrutinize the entire record and ascertain whether there is substantial evidence for the Board's finding", found misunderstanding as to the purpose of the cards, and held:

> "Proof of such a prevalent and pervading misconception *when generated by the union organizers representations cannot be ignored.*" (Pet. App. A, p. 22) (Emphasis supplied).

In sum, the Court found "substantial evidence on the record considered as a whole" demonstrated a "prevalent and pervading misconception" as to the purpose of the cards which was "generated by the union organizers representations", for example, *"that the signers of the cards would not be joining the union at this time,* that this would be deferred until after the election . . ." (Emphasis is the Court's). In reviewing the substantiality of the evidence supporting (or not supporting as it turned out) the Board's order, the Fourth Circuit was performing a duty imposed on it by this Court. We submit that this Court should not grant certiorari to review the weight of the evidence in this case as that function should properly remain in the hands of the Court of Appeals. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474; *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498; *National Labor Relations Board* v. *American National Insurance Company,* 343 U.S. 395.

Clearly, the Fourth Circuit did not predicate its conclusion on the "subjective" intent of the signers. It did emphasize "the actual understanding of the signers" as to the purpose of the cards and found "misapprehension of their purpose", but found this relevant and persuasive evidence supporting the company's position that the cards were invalid because of solicitor representations as to the purpose of the cards. The Court quoted from the Sixth Circuit's decision in *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.,* 6 Cir., 341 F.2d 750, 754 (Pet. App. A, p. 23) that representations "to the effect that the only purpose of the card" is to obtain an election are entitled

to more weight than the card language.[4] Further, by rejecting the Board's narrow evidentiary rule underlying *Cumberland Shoe* as a "ghost of the parol evidence rule" and by emphasizing the "prevalent and pervading misconception" as to the purpose of the cards, the Fourth Circuit places itself squarely in line with the Sixth Circuit which has recently held such evidence:

> ". . . is relevant in assessing the effect of the solicitor's words, for it casts a telling reflection on the actual communication conveyed to the signer. The testimony of the signer as to his *expressed* state of mind is also relevant in determining whether his misapprehension over the purpose of the card was *knowingly induced* by the solicitor." *National Labor Relations Board* v. *Swan Super Cleaners, Inc.*, 6 Cir., 384 F.2d 609, 617.

This pronouncement of the Sixth Circuit is a particularly persuasive view of the relevancy of this evidence as it was that Circuit which granted enforcement to the Board's *Cumberland Shoe* findings and bargaining order. *National Labor Relations Board* v. *Cumberland Shoe Corp.*, 6 Cir., 351 F.2d 917. The other Circuits are in accord: *National Labor Relations Board* v. *S. E. Nichols Co.*, 2 Cir., 380 F.2d 438, 443 (". . . at least three of the signers were induced to affix signatures by statements causing them to believe that the union would not receive representation status without an election."); *National Labor Relations Board* v. *Dan Howard Mfg. Co.*, 7 Cir., ... F.2d ....., 67 L.R.R.M. 2278, 2281 (". . . statements made

4. This language "to the effect that" was later italicized by the Sixth Circuit as indicating a rejection of the mechanistic "sole" or "only" words insisted upon in Board cases, see *National Labor Relations Board* v. *Swan Super Cleaners, Inc.*, 6 Cir., 384 F.2d 609, 617. Thus the misrepresentation found by the Court that ". . . the employees would not be joining at this time . . ." is sufficient to invalidate cards under the Sixth Circuit's *Cumberland Shoe* rule as explained. See pages 8-10, infra.

by Weiner created in Burdett's mind a misapprehension as to what signing the card meant . . ."); *Bauer Welding and Metal Fabricators, Inc.* v. *National Labor Relations Board,* 8 Cir., 358 F.2d 766, 774 (a letter ". . . succeeded in, creating the impression in the minds of the employees that the Union would become bargaining agent only by winning an election . . .").[5]

Thus, the "Question Presented" by the Board is not raised in the instant case, since the Court below invalidated the cards because "prevalent and pervading misconceptions" as to their purpose was "generated" by the organizers' misrepresentations.[6]

POINT II

No Conflict Exists Between the Decision of the Fourth Circuit Court of Appeals and the Decisions of the Other Circuits Which Have Considered the Issue Presented in This Case.

In the case at bar, the Board seeks to predicate its writ on an ostensible conflict between the circuits concerning the application of its *Cumberland Shoe* rule (Pet., pp. 12-14) by which the Board asserts it is "necessary to establish that the solicitor indicated to the signer that the card would be used *only* for a Board election" (Pet.,

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5. The Board would not consider such evidence as it concedes: "In view of the unreliability of testimony, given long after the event, as to the employee's subjective state of mind, the Board . . . has held that the act of signing an unambiguous authorization card cannot be impeached by the employee's later testimony that he believed he was signing for some other reason." This, at least, highlights the issue as one of testimonial reliability and, as such, more properly left to the Circuit Courts of Appeal to review on an *ad hoc* basis. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-911.

6. Indeed, the Board concedes that Patrick, the head solicitor, stated that the signers wouldn't be joining the union until "the Union had *won* the *election.*" (Pet., p. 4).

p. 12) before the card could be considered as vitiated in so-called "card-check" cases.

The Board cites the District of Columbia and First Circuits in alleged opposition to the Fifth and Fourth Circuits. As is shown, *infra*, there is no conflict among the circuits. The conflict rather is between the Board's application, on the one hand, of a rigid *per se* rule requiring an express declaration by the solicitor of "sole" or "only" purpose before the cards will be invalidated in determining a union's alleged majority and, on the other hand, the rulings by the several Courts of Appeals, which consider the whole body of evidence to determine whether the representations by solicitors, while not using the magic words, "sole" or "only," were calculated to and did create misunderstanding or misapprehension as to the purpose of the cards.[7]

The opposition which exists, not among the circuits but between the Board and the circuits, is fairly illustrated by *National Labor Relations Board* v. *Swan Super Cleaners, Inc,,* 6 Cir., 384 F.2d 609. The Sixth Circuit pointed out the Board's misinterpretation of *Cumberland*:

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7. There are many ways for a clever organizer to disguise the purpose of the cards without using the magic words "sole" or "only":

> ". . . he said it wasn't joining the Union, that they were just campaigning." *National Labor Relations Board* v. *Swan Super Cleaners, Inc.,* 6 Cir., 384 F.2d 609, 616.

> ". . . after he received a few more cards, there would be an election." *Bauer Welding and Metal Fabricators, Inc.* v. *National Labor Relations Board,* 8 Cir., 358 F.2d 766, 775.

> "To come to the meeting to see what we are doing." *National Labor Relations Board* v. *Dan Howard Mfg. Co.,* 7 Cir., ——— F.2d ———, 67 LRRM 2278, 2282.

> ". . . if I signed the card I would not be joining the union . . . in order to get the union in the store an election would have to be held in the store." *National Labor Relations Board* v. *S. E. Nichols Co.,* 2 Cir., 380 F.2d 438, 443.

The courts have found that such representations are invalidating.

> "It appears that the examiner's position was, and the Board's position now is, that unless the solicitor has actually employed the words 'sole' or 'only' in his sales talk, our opinion in *Cumberland* insulates the solicitation from condemnation, no matter what its other vices. We do not believe the language employed in *Cumberland* suggests any mechanical interpretation. The 'outright misrepresentation' referred to therein could certainly be accomplished by other words than 'sole' or 'only.' A sophisticated and only modestly talented union agent could easily live with such a narrow rule and, leaving out the *bad words*—'sole' and 'only'—employ language clearly calculated to lead a woman laundry worker to believe that the holding of an election was all that she signed up for." 384 F.2d at 620.

The Sixth Circuit in *Swan* therefore found it necessary to clarify its enforcement of *Cumberland Shoe*, expressly disavowing the view that *Cumberland* held that the word "sole" or "only" was needed to invalidate a card.

> "We think it right now to say that we do not consider that we have announced a rule that only where the solicitor of a card actually employs the specified words 'This card is for the *sole* and *only* purpose of having an election' *will* a card be invalidated. We did not intend such a narrow and mechanical rule. We believe that whatever the style or actual word of the solicitation, if it is clearly calculated to create in the mind of the one solicited a belief that the *only purpose of the cards is to obtain an election,* an invalidation of the card does not offend our *Cumberland* rule." 384 F.2d at 618.

The court expressly adhered to *Cumberland Shoe,* stating that its rule is not offended by invalidating cards no matter what style or wording is used by the organizer "if it is clearly calculated to create in the mind of the

one solicited a belief that the only purpose of the card is to obtain an election." 384 F.2d at 618. Although the Sixth Circuit, as have the other Courts of Appeals, rejected the Board's mechanistic approach, the Board has refused to accept the rationale of the several courts that the misrepresentations, while not couched in the exact terms "sole" or "only," may nevertheless, when weighed in the light of substantial evidence, invalidate the cards.

All circuits, we submit, including the Fourth Circuit in the case at bar, when presented with substantial evidence of misrepresentations which have led to misapprehension and misunderstanding of the purpose of the cards, have correctly rejected such cards as being a proper and binding designation by the employee signer of the union as his bargaining representative, without finding it necessary to subject each individual card to the "only" or "sole" purpose test.

The Board relies on the decisions of the Courts of Appeals in the District of Columbia and First Circuits, to show conflict, but neither the District of Columbia Circuit nor the First Circuit has adopted the rigid and mechanistic *per se* rule adhered to by the Board. The Board cites *National Labor Relations Board* v. *Southbridge Sheet Metal Works, Inc.*, 1 Cir., 380 F.2d 851, 855-856 (Pet., p. 12). The court in that case did not accept the mechanical rule enunciated in *Cumberland Shoe*. Although it granted enforcement of the Board's order, it did so on the basis that substantial evidence showed there was no misrepresentation:

> "As to the alleged misrepresentation infecting nine of the authorization cards, the Board affirmed the Trial Examiner's findings on the ground that no purposes communicated to the employees purported to be the *sole* reason for signing the cards.

"After reviewing all of the testimony concerning each of the nine cards, we conclude that the Board's decision must stand. There is no evidence of such a 'hard sell' as would overcome the fact of signing a clearcut authorization card.

"Without going so far as to say that a misrepresentation cannot ever vitiate a card when it is not proffered as a sole reason for signing, we have no hesitation in saying that here the representation that there would be an election does not invalidate Therrien's card. Cf. NLRB v. Gotham Shoe Mfg., 359 F.2d 684 (2d Cir. 1966); NLRB v. Cumberland Shoe Corp., 351 F.2d 917, 920 (6th Cir. 1965)."

Thus, while granting enforcement, the First Circuit's articulated view is clearly consistent with the developments in other circuits, including the Fourth.

The Board also cites *United Automobile Workers* v. *National Labor Relations Board and Preston Products, Inc.*, D.C. Cir., ... F.2d ....., 66 LRRM 2548, and *United Automobile Workers* v. *National Labor Relations Board and Aero Corp.*, D.C. Cir., 363 F.2d 702, cert. den. 385 U.S. 973, as manifesting a conflict. However, in *United Automobile Workers* v. *National Labor Relations Board and Aero Corp.*, the court did not discuss the "only" or "sole" purpose issue, but rather relied on an earlier Seventh Circuit decision, *National Labor Relations Board* v. *Glasgow Co.*, 7 Cir., 356 F.2d 476, 478-479, subsequently explained by *National Labor Relations Board* v. *Dan Howard Mfg. Co., infra,* with which the instant case is in accord, and made no reference whatsoever to *Cumberland Shoe.* The case, therefore, can hardly be regarded as showing conflict. In the *Preston Products* case, *supra,* the District of Columbia Circuit limited its acceptance of the Board's *Cumberland Shoe* doctrine and noted that, while it approved of the Board's general use of the rule,

> "It is entirely possible, of course, that in a particular case the credited evidence as to the circumstances under which the cards were signed would reveal such gross misstatement as to the union's intention, or as to matters unrelated to an election, that the Cumberland rule would not be applied by the Board. Nor would we require its application, for given such gross misrepresentation the employee's signature on the card could not be construed as a fair and free designation of the union as his bargaining agent. Thus, Cumberland does not articulate an absolute rule, but rather a useful and well founded rule of thumb." 66 LRRM at 2552.

This, too, has been the rule applied in the Fourth and Fifth Circuits and, as the Board has conceded, in the Second, Sixth, Seventh and Eighth Circuits (Pet., p. 13).[8]

In the Seventh Circuit, for example, the issue turned on the question of whether substantial evidence supported the representations made in connection with the signing of cards. That circuit, in *Happach* v. *National Labor Relations Board*, 7 Cir., 353 F.2d 629, 631, relied upon *Cumberland Shoe*. This reliance has been clarified by the same court in *National Labor Relations Board* v. *Dan Howard Manufacturing Co.*, 7 Cir., ... F.2d ....., 67 LRRM 2278:

> "We apply the restatement in Swan of the Cumberland rule and hold that 'in its total context' the only reasonable inference that can be drawn from the

8. The Board appears to take the position that the District of Columbia and First Circuits, if presented with a record containing substantial evidence of misrepresentation causing employees to misunderstand the purpose of the cards, would apply the mechanical interpretation of *Cumberland Shoe* urged by the Board in the case at bar. It is highly speculative to contend that the courts would slavishly adhere to a literal and mechanistic interpretation of what has been characterized as a mere "rule of thumb." See *National Labor Relations Board* v. *Southbridge Sheet Metal Works, Inc., supra,* and *United Automobile Workers* v. *National Labor Relations Board and Preston Products, Inc., supra.*

> Weiner-Burdette colloquy, as testified to by her, is that *statements made* by Weiner created in Burdette's mind *a misapprehension as to what signing the card meant* and that her signature on the card did not represent an intention to designate the Union as her bargaining agent. We do not view this as a departure from the holding in Happach v. NLRB, 353 F.2d 629, a case relied on by the Board, *since we interpret Happach in the same manner as the Sixth Circuit interpreted Cumberland in its opinion in the Swan case.* 67 LRRM at 2281." (Italics supplied).

Again, the court was careful to note by appendix references the misrepresentations and found substantial evidence concerning misapprehension, which was not presented in *Happach.*

So, too, the Second Circuit, in *National Labor Relations Board* v. *S. E. Nichols Company,* 2 Cir., 380 F.2d 438, 442-445, rejected the mechanical approach urged by the Board, distinguished on the facts a prior Second Circuit case in line with *Cumberland Shoe* (*National Labor Relations Board* v. *Gotham Shoe Mfg. Co.,* 2 Cir., 359 F.2d 684, 686) and, on the basis of substantial evidence not supporting the Board's conclusion, allied itself with the other circuits:

> "But while clarity should constitute the beginning of any effort to show a majority on the basis of authorization cards, it is not the end; the clearest written words can be perverted by oral misrepresentations, especially to ordinary working people unversed in the 'witty diversities' of labor law." 380 F.2d at 442.
>
> * * *
>
> "In our view the evidence demands a conclusion that at least three of the signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election." 380 F.2d at 443.

Thus, all circuits have rejected the mechanical "sole" or "only" purpose test urged by the Board, and followed a broader basis for invalidating cards when confronted with substantial evidence demonstrating misrepresentations which, variously, ". . . caused [employees] to believe . . ."[9] or "generated misapprehension"[10] or were ". . . calculated to create a belief . . ."[11] or "succeeded in creating the impression in the minds of the employees . . ."[12]—all demonstrating preferences in descriptive word selection but certainly not a conflict as to an important and substantial rule of law.

CONCLUSION

The Fourth Circuit, in the case at bar, found that the Board's finding that the cards were not induced by misrepresentation was not supported by substantial evidence. In invalidating the cards found to be induced by "a prevalent and pervading misapprehension . . . generated by the union organizers' misrepresentations," the Fourth Circuit has aligned itself with the other circuits which have refused to stick mechanically to the literal phrasing of the cards when presented with such wholesale misunderstanding created by the union. As stated by this Court concerning review of substantial evidence questions:

> "Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is

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9. *National Labor Relations Board* v. *S. E. Nichols Co.*, 2 Cir., 380 F.2d 438, 443.

10. *National Labor Relations Board* v. *Dan Howard Manufacturing Co.*, 7 Cir., ... F.2d ....., 67 LRRM 2278, 2281; *Crawford Manufacturing Co., Inc.*, 4 Cir., 386 F.2d 367, 371.

11. *National Labor Relations Board* v. *Swan Super Cleaners, Inc.*, 6 Cir., 384 F.2d 609, 618.

12. *Bauer Welding and Metal Fabricators, Inc.* v. *National Labor Relations Board*, 8 Cir., 358 F.2d 766, 774.

substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or misapplied." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-91.

This is not such an instance and, therefore, for the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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